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# **In the Supreme Court of the United States**

OCTOBER TERM, 1971

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No.

UNITED STATES OF AMERICA, PETITIONER

v.

CECIL J. BISHOP

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## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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### **OPINION BELOW**

The opinion of the court of appeals (App. A, *infra*, pp. 13-18) reversing the judgment of conviction is reported at 455 F. 2d 612.

### **JURISDICTION**

The judgment of the court of appeals (App. B, *infra*, p. 19) was entered on February 11, 1972, and a petition for rehearing, with the suggestion that it be *en banc*, was denied on April 28, 1972 (App. C, *infra*, p. 20). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the word "willfully" denotes a lower degree of turpitude in 26 U.S.C. 7207, a tax misdemeanor statute, than in 26 U.S.C. 7206(1), a tax-felony statute, and thus makes the misdemeanor a lesser-included offense with respect to the felony.

## RULE AND STATUTES INVOLVED

Rule 31(c) of the Federal Rules of Criminal Procedure in pertinent part provides:

The defendant may be found guilty of an offense necessarily included in the offense charged \* \* \*.

Sections 7206 and 7207 of the Internal Revenue Code of 1954 (26 U.S.C.) in pertinent part provide:

Section 7206. *Fraud and false statements.*

Any person who \* \* \* (1) willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter \* \* \* shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Section 7207. *Fraudulent returns, statements, or other documents.*

Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by

him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both.

\* \* \*

### STATEMENT

After a jury trial in the United States District Court for the Eastern District of California, respondent was convicted on three counts of having willfully made and subscribed, under penalties of perjury, income tax returns for 1963, 1964, and 1965 which he did not believe to be true as to material matters, in violation of 26 U.S.C. 7206(1). Respondent was fined \$5,000 and sentenced to 90 days' imprisonment (to be spread over 45 weekends) and to five years' probation. The court of appeals reversed and remanded for new trial.

Respondent, a practicing attorney, also owned a walnut ranch (App. A, *infra*, p. 13). In his income tax returns for the years in question, respondent overstated the deductible expenses of the ranch by the following amounts (*id.* at 14):

1963—\$19,923.87

1964—\$17,021.70

1965—\$10,062.86

At trial, respondent testified that in preparing his returns he relied upon information furnished by the ranch manager upon the computations made by his legal secretary (*ibid.*). He requested instructions, interpreting the word "willfully," as used in 26 U.S.C. 7206(1) and 7207, to mean that if the

jury found that he had acted only capriciously or with a careless disregard for the lawfulness of his acts but not with a bad purpose, it could find him guilty of the misdemeanors of willfully filing returns known by him to be false or fraudulent in material matters, in violation of Section 7207, and not guilty of the felonies charged under Section 7206(1).<sup>1</sup> These re-

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<sup>1</sup> The instructions requested by respondent were as follows:

**DEFENDANT'S REQUESTED INSTRUCTION NO. 27**

**(Lesser-Included Offense)**

A lesser included offense is an offense made up of some, but not all, of the elements of the offense charged. The crime of willfully delivering a false return includes the following elements:

- (1) That the defendant filed the return; and
- (2) That he knew it to be false as to a material matter.

It differs from the offense charged in the indictment in that:

- (1) It does not require that the defendant willfully signed a declaration under penalty of perjury, and,
- (2) It required a lesser degree of willfulness.

**DEFENDANT'S REQUESTED INSTRUCTION NO. 28**

**(Lesser-Included Offense)**

If, as to any count, you are convinced beyond a reasonable doubt that the defendant knew the return to be false as to a material matter, and that he acted with a bad purpose or without reasonable cause, or capriciously, or with careless disregard, but you are not satisfied beyond a reasonable doubt that he had formed the bad or evil purpose of misleading the Government, then you should find him guilty of the lesser offense of delivering a false return.

Similarly, if you are convinced beyond a reasonable doubt both that he knew the return to be false as to a material matter and that he had formed the bad or evil purpose of mis-

requested instructions were refused and respondent was convicted of the felonies as charged.

The court of appeals reversed on the ground that the requested instructions should have been given pursuant to Rule 31(c), Fed.R.Crim.P. In so doing, the court acknowledged that under the facts here, aside from the issue of the necessary degree of willfulness, there was no rational basis for a conviction of the misdemeanor alone (*id.* at 17).<sup>2</sup> However, the court

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leading the Government, but you are not satisfied beyond a reasonable doubt that he knew the return contained a declaration and it was made under the penalties of perjury, you should find him guilty of the lesser offense of delivering a false return.

In other words, you should find the defendant guilty of the lesser offense if you have a reasonable doubt either that the defendant knew that what he signed contained a declaration under penalty of perjury, or that he acted with the specific evil purpose of misleading the Government, but you are satisfied beyond a reasonable doubt as to every other element of the offense as I have described it to you.

#### DEFENDANT'S REQUESTED INSTRUCTION NO. 29

##### (Willfulness and Misdemeanors)

The offense charged, willfully making a false return under penalty of perjury, is a felony; whereas the lesser offense of willfully delivering a false return is a misdemeanor. The word willful, as used in misdemeanors, means with a bad purpose or without grounds for believing that one's act is lawful, or without reasonable cause, or capriciously, or with a careless disregard whether one has the right so to act. That the defendant formed the specific evil purpose of misleading the Government with respect to the correct amount of tax due is required for conviction of the felony charged, but it is not required for conviction of the lesser misdemeanor offense of delivering a false return.

<sup>2</sup> See *infra*, pp. 6-7.

reasoned that to establish willfulness in tax felony prosecutions it is necessary to prove "a bad purpose or evil motive" (*id.* at 16), whereas in tax misdemeanor prosecutions it is necessary to show only that the act was committed "without grounds for believing that [it was] lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act" (*id.* at 16-17). On this basis, the court found that an instruction on the lesser offense was required.

#### REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is in conflict with this Court's decision in *Sansone v. United States*, 380 U.S. 343, and with the decisions of other courts of appeals. If left standing, the decision will adversely affect the administration of the criminal tax laws in the Ninth Circuit and may also hamper prosecutions of non-tax felonies involving willfulness.

1. Rule 31(c), Fed.R.Crim.P., incorporates the general rule that a defendant is entitled to have the jury instructed as to a lesser-included offense. However, this Court has repeatedly held that "[t]he lesser-included offense doctrine does not apply if the factual issues to be resolved by the jury are the same as to both the lesser and greater offenses \* \* \*." 2 Wright, *Federal Practice and Procedure: Criminal* 374 (citing *Sansone v. United States*, 380 U.S. 343; *Berra v. United States*, 351 U.S. 131; *Sparf v. United States*, 156 U.S. 51). Respondent conceded in his brief below (at pp. 13-14) and the court of appeals

recognized (App. A, *infra*, p. 17), that under the circumstances here the acts prohibited by the felony and misdemeanor statutes were identical,<sup>3</sup> and therefore, that with the possible exception of the degree of willfulness, the same factual issues were left for resolution under both statutes. Thus this case presents the same question which this Court resolved in *Sansone v. United States*, *supra*.<sup>4</sup>

In *Sansone*, the defendant was charged with willfully attempting to evade taxes in violation of 26 U.S.C. 7201, a felony. He requested instructions that he could be acquitted of the felony charge but convicted of violating Section 7207, the same misdemeanor statute involved in this case.<sup>5</sup> After finding that under the circumstances there the two statutes prohibited the same acts, the Court concluded (at 353):

\* \* \* [I]f, as the jury obviously found, petitioner's act was willful in the sense that he knew that he should have reported more income than he did \* \* \* he was guilty of violating both §§ 7201 and 7207. If his action was not willful,

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<sup>3</sup> It is an element of the offense under Section 7206(1), the felony statute, that the false return be made under the penalties of perjury. This element is absent in the misdemeanor statute, Section 7207, which simply proscribes the delivery of a false return. In this case, however, it was undisputed that the false returns were subscribed under penalties of perjury.

<sup>4</sup> Indeed, *Sansone* seems so directly controlling of the issue here that summary reversal may be appropriate.

<sup>5</sup> The defendant in *Sansone* also requested a charge on another misdemeanor offense, 26 U.S.C. 7203.

he was guilty of violating neither. \* \* \* [O]n the facts of this case, § § 7201 and 7207 "covered precisely the same ground," *Berra v. United States, supra*, at 134, and thus petitioner was not entitled to a lesser-included offense charge based on § 7207.

This Court in *Sansone* therefore foreclosed the general argument, relied upon by the court below, that tax felonies require a higher degree of willfulness than tax misdemeanors. See also *Spies v. United States*, 317 U.S. 492. Furthermore, this case cannot be meaningfully distinguished from *Sansone*. Although the felony provision involved in *Sansone* was Section 7201 rather than Section 7206(1),\* both require that the prohibited act be committed "willfully"; and there is no basis for concluding that the same word describes a higher degree of volition in one of those felony statutes than it does in the other. Therefore if, as *Sansone* holds, Section 7201 and 7207 employ the same test of willfulness, so do Sections 7206(1) and 7207. Moreover, nothing appears in the language, history, or purpose of the latter provisions which suggests that they invoke different volitional standards. Therefore, in this case the two statutes "covered precisely the same ground" and no instruction as to the lesser offense was required.

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\* Section 7206(1), like Section 7201, imposes no minimum penalties. "The lack of minimum penalties \* \* \* denies to the prosecutor an unbridled discretion as to the penalty to be imposed upon particular defendants by deciding whether, on the same facts, to charge a felony or a misdemeanor." *Sansone*, 380 U.S. at 350 n. 6.

2. The holding below is also in conflict with the Fifth Circuit's decision in *Escobar v. United States*, 388 F. 2d 661, certiorari denied, 390 U.S. 1024. There, as here, the defendant was charged with willfully making and subscribing false income tax returns, in violation of Section 7206(1). His request for instructions on the misdemeanor under Section 7207 was denied, and the Fifth Circuit affirmed the conviction, stating (at 666):

Accepting these [*Sansone*] guidelines, the question narrows to whether there is "a disputed factual element" in Section 7206(1) which is not present in Section 7207. As pointed out the only difference between the two statutes is in the "made under the penalties of perjury" requirement in Section 7206(1). If there was any question for the jury concerning whether some or all of the returns involved here were or were not "made under the penalties of perjury" appellant would have been entitled, under *Sansone*, to the requested charge. However, appellee contends, and appellant does not dispute, that all returns involved here contain the "perjury declaration." Therefore, there was no factual dispute concerning the charged greater offense to be submitted to the jury, *ergo* appellant was not entitled to his requested charge.

Accord: *United States v. Mathews*, 335 F. Supp. 157 (W.D. Pa.), defendant's appeal dismissed (C.A. 3, No. 72-1085, decided June 6, 1972). The Fifth Circuit thus has rejected any distinction between the kinds of willfulness required under the felony and misdemeanor provisions involved in this case.

The holding below also enunciates a lower standard of willfulness in misdemeanor cases than has been deemed acceptable by other courts of appeal.' In *United States v. Vitiello*, 363 F. 2d 240, 241-242 (C.A. 3), and *Haner v. United States*, 315 F. 2d 792, 793 (C.A. 5), involving prosecutions for tax misdemeanors, instructions permitting conviction on the basis of a careless disregard of the truth were held to constitute reversible error because they created the risk that juries might convict for conduct they found to be the result of mere carelessness. This standard

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' The standard stated by the court results from a misapplication of this Court's language in *United States v. Murdock*, 290 U.S. 389. In that case this Court stated (at 394-395):

The word [willfulness] is also employed to characterize a thing done without ground for believing it is lawful \* \* \*, or conduct marked by careless disregard whether or not one has the right so to act \* \* \*.

This language has been a source of some confusion (see, e.g., *Bloch v. United States*, 221 F. 2d 786, 789 (C.A. 9)), despite this Court's clarifying explanation in *United States v. Illinois Cent. R. Co.*, 303 U.S. 239, in which it is stated (at 242-243):

In statutes denouncing offenses involving turpitude, "willfully" is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is "intentional, or knowing, or voluntary, as distinguished from accidental," and that it is employed to characterize "conduct marked by careless disregard whether or not one has the right so to act."

It is thus apparent that the "careless disregard" language of *Murdock* can have no application to Section 7207, for that provision denounces an "offense involving turpitude."

of "careless disregard" is, moreover, weaker than that prescribed by this Court in *Sansone* (see *supra*, p. 7).

3. By granting juries discretion in this context to find only misdemeanor offenses in felony prosecutions, the decision below has diminished the rationality of the process of criminal tax adjudication in the Ninth Circuit. Convictions under Section 7207 rendered pursuant to the rule laid down by the court below will represent miscarriages of justice: on the one hand, if the defendant is in fact guilty of the felony, legitimate exercise of the prosecutor's discretion that he be punished for the more serious crime Congress has defined is frustrated by conviction only of the misdemeanor (cf. *United States v. Whitaker*, 447 F. 2d 314, 317, n. 8 (C.A. D.C.)); on the other hand, if he is not guilty of the felony, a conviction of the misdemeanor based on a jury finding of mere carelessness is unwarranted.

Furthermore, although the court's interpretation of "willfully" as denoting a different volitional element for felonies than for misdemeanors was expressly restricted to tax prosecutions, there appears no reasoned basis for not extending this dual construction to non-tax criminal statutes. Such an extension could seriously impair prosecutions under other felony statutes requiring a showing of willfulness.

**CONCLUSION**

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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**JUNE 1972.**

## APPENDIX A

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 71-1950

[Filed Feb. 11, 1972, Wm. B. Luck, Clerk]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

Appeal from the United States District Court  
For the Eastern District of CaliforniaBEFORE: ELY and WRIGHT, Circuit Judges, and  
POWELL, District Judge\*

POWELL, District Judge:

This appeal is taken from conviction on three counts of willfully making and subscribing, under penalties of perjury, false income tax returns in violation of 26 U.S.C. § 7206(1).

The taxpayer was a practicing attorney in Sacramento, California. He also operated a walnut ranch near Red Bluff, California, which was managed by his stepmother. During the years covered by the indictment, 1963, 1964, and 1965, the ranch operated at a loss. The taxpayer reported no tax for the years 1963 and 1964; his tax in 1965 was \$1,018.98. The charge of false declaration on the taxpayer's personal income tax returns arose out of items which he listed as de-

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\* Honorable Charles L. Powell, United States District Judge for the Eastern District of Washington, sitting by designation.

ductible farm expenses incurred in the operation of the ranch. As ranch manager, the taxpayer's stepmother kept records of the day-to-day expenses. To meet these expenses the taxpayer sent weekly checks to his stepmother; occasionally he paid creditors directly. At the end of the year his stepmother furnished an itemized accounting of all expenses, to which all expenses paid directly to creditors were added. The lists of expenses furnished were turned over to one of the secretaries in the taxpayer's law office. From these lists with other expenses, schedules of expenses were prepared, which were entered by the taxpayer on his income tax returns.

The understatement of income resulted from the addition of expenses. To the itemized list of expenses, including the expenses paid directly to creditors, the taxpayer added all the payments made to his stepmother as ranch manager. The effect was to double deductible expenses. This procedure resulted in the overstatement of farm expenses in the following amounts: in 1963—\$19,923.87; in 1964—\$17,021.70; and in 1965—\$10,062.86. The taxpayer testified that he relied upon the computations of his stepmother and his legal secretary.

The taxpayer complains of three errors, specifically that: First, in his prosecution for violation of 26 U.S.C. § 7206(1), he was entitled under the evidence to a jury instruction by which the jury could find him guilty of a violation of 26 U.S.C. § 7207, as a lesser included offense; Second, it was error to admit his 1961 return; and Third, it was error to admit that an item of farm income accruing in 1965, was reported in his 1964 return.

The taxpayer's first argument is well taken. Rule 31(c) of the Federal Rules of Criminal Procedure

permits the jury to find the defendant guilty of an offense not charged in the indictment if that offense is "necessarily included in the offense charged." The instruction submitted and rejected was essentially 26 U.S.C. § 7207,<sup>1</sup> which is a misdemeanor. The contention is that this section is a lesser included offense of 26 U.S.C. § 7206(1).<sup>2</sup> The doctrine of the lesser included offense requires that there be similar factual elements as to both the lesser and the greater offenses; but that the elements of the lesser offense be included within, but not completely subsumed by the greater. See *Olais-Castro v. United States*, 416 F.2d 1155, 1157 (9th Cir. 1969); *James v. United States*, 238 F.2d 681, 683 (9th Cir. 1956); 8 Moore's Federal Practice ¶ 31.03.

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<sup>1</sup> "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, know by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both. Any person required pursuant to sections 6047(b) or (c), 6056, or 6104(d), to furnish any information to the Secretary or any other person who willfully furnishes to the Secretary or such other person any information known by him to be fraudulent or to be false as to any material matter shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both."

<sup>2</sup> "Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter;

\* \* \* \*

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Both Sections 7206(1) and 7207 contain the element of wilfulness. In income tax prosecutions this circuit has repeatedly interpreted the word "wilfulness," as used in a misdemeanor statute, to mean something less than the same word "wilfulness" used in a felony statute. *United States v. Haseltine*, 419 F.2d 579 (9th Cir. 1969); *United States v. Fahey*, 411 F.2d 1213 (9th Cir. 1969), *cert. denied*, 396 U.S. 957 (1969); *Eustis v. United States*, 409 F.2d 228 (9th Cir. 1969); *Edwards v. United States*, 375 F.2d 862 (9th Cir. 1967); *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963); *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958).

*Abdul v. United States*, 254 F.2d 292, 293 (9th Cir. 1958), best highlights the distinction drawn under the tax statutes between felonies and misdemeanors:

"The meaning of the word 'wilfully' as used in the tax statutes has been considered in a number of cases and seems to have come to rest in this Circuit, as well as others, as meaning with respect to felonies, 'with a bad purpose or evil motive.' But the meaning of the word 'wilfully' as used in the statute defining a misdemeanor has not as yet reached such repose." (citations omitted.)

See also, *United States v. Murdock*, 290 U.S. 389, 396 (1933).

The court instructed the jury in *Abdul v. United States*, *supra* 294, with the following definitions of wilfulness:

"The word 'wilful' as used in [the misdemeanor] counts \* \* \*, that is, failing to make a tax return, means with a bad purpose or without

*grounds for believing that one's act is lawful or without reasonable cause, or capriciously or with a careless disregard whether one has the right so to act. The word 'wilful' as used in the [felony] counts \* \* \* that is, in failing to truthfully account for and pay over the taxes, means with knowledge of one's obligation to pay the taxes due and with intent to defraud the Government of that tax by any affirmative conduct. Further, with respect to these counts, wilfulness implies bad faith and an evil motive."* (Emphasis added.)

These extended instructions in *Abdul* were intended to clarify the meaning of "wilful" in the misdemeanor counts, under Sections 7203 and 7207.

Both Sections 7206(1) and 7207 apply to the filing of false and fraudulent returns. *Sansone v. United States*, 380 U.S. 343, 347-49 (1965). Violation of Section 7207 is a misdemeanor, whereas violation of Section 7206(1) is a felony. Under the evidence presented the elements of the two offenses are the same, with the exception of the element of wilfulness.<sup>3</sup> Following *Abdul* "wilfulness," within the meaning of Section 7206(1), requires proof of an evil motive and bad faith. Evidence under Section 7207 need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed.

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<sup>3</sup> Section 7206(1) contains the added element of subscription under "penalties of perjury," which Section 7207 does not. However, where an individual income tax return is filed, Section 6065(a), in conjunction with Treas. Reg. § 1.6065-1(a), 26 C.F.R., imposes this element under Section 7207 by operation of law.

Under the circumstances of this case it was error to reject an instruction embodying Section 7207, as a lesser included offense. Since this case will be remanded for retrial it is not necessary to determine the merits of the second and third assignments of error.

Reversed and remanded for a new trial in accordance with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 71-1950

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*vs.*

CECIL J. BISHOP, DEFENDANT-APPELLANT

APPEAL from the United States District Court for the Eastern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded.

Filed and entered February 11, 1972

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

[Filed May 1, 1972, Clerk]

No. 71-1950

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

CECIL J. BISHOP, DEFENDANT-APPELLANT

BEFORE: ELY and WRIGHT, Circuit Judges, and  
POWELL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED: April 28, 1972.